IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1032

GERARD P. TROTTA,

Petitioner,

—against—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Statement

This brief is submitted in reply to the "Brief for the United States in Opposition" served upon Petitioner on or about April 23, 1976.

ARGUMENT

1. Response to the Government's argument that review now by this court is procedurally premature (P. 4 of Brief).

This contention must be rejected for two reasons:

(1) It is a denial of due process to subject an individual to the stigma, expense, and anxiety of a criminal trial based upon an infirm indictment. (See *Klopfer* v.

North Carolina, 386 U.S. 212, 221-222 (1967) where the Court indicated that a defendant awaiting trial on bond is exposed to public scorn, deprivation of employment, and chilled in the exercise of his right to speak or associate and participate in unpopular political causes, and *United States* v. *Enmons*, 410 U.S. 396 (1973) where this Court affirmed a lower court's dismissal of an indictment pretrial). Petitioner will be irreparably damaged if he is forced to go to trial, is convicted, and his conviction is affirmed, before this Court ultimately decides that the indictment and theory of the prosecution are totally defective.

(2) The Court of Appeals decision below, which reversed the trial court's dismissal of the indictment, established the law of the case and set forth the elements that are necessary for a jury to bring in a conviction. If the Court of Appeals directive stands, all that is necessary for conviction is for the jury to find:

(a) That petitioner was a public employee;

(b) That he had certain statutory power which *could* be used to affect Cosulich's business with the Town;

(c) That Cosulich knew of petitioner's statutory power; and

(d) That Petitioner successfully approached Cosulich for contributions to a political party.

Under the Court of Appeals directive, the government need not prove, the court need not charge, and the jury need not find, that petitioner imparted or exploited a reasonable belief that he had effective influence over the award of contracts. The "corrupt use" of the office has been totally eliminated. Petitioner stands in no worse position than any other public employee who seeks funds for any socially legitimate end (whether it be the Boy

Scouts, a local charity, higher wages, or political contributions), from one over whom he holds any degree of power, no matter how equivocal, no matter how slight.

None of the important decisions of recent years involving the application of the Hobbs Act to public employees is supportive of the government's view. In each of the cases, the essential connection between (1) power, and (2) payment, was (3) *the specific identifiable misuse of office.* It is the absence of the latter element which is the critical infirmity in the accusation against this petitioner. (For a survey of Hobbs Act cases, see 396 F. Supp., p. 757, reproduced at p. 4a of the Petition).

Beyond petitioner's own stake in this case, the Court of Appeals decision not only has a "chilling effect" on local political fund-raising efforts (a problem which was recently considered in *Buckley* v. *Valeo*, — U.S. —, 96 S. Ct. 612, [1976]), but heralds a new judicially created social revolution. Is Nelson Rockefeller an extortionist when the Vice President solicits on behalf of his own Party? Is the local district attorney an extortionist when he solocits (from lawyers dealing with his office) on behalf of his favorite charity? The government's position is *yes*.

2. (a) Answering the Government's argument that that an indictment under the Hobbs Act for extortion under color of official right need not allege "a specifically identifiable misuse of the the office" (P. 4 of Brief).

The within indictment does not contain an allegation that petitioner "used or abused his official position in seeking or obtaining the political contributions" and the government maintains that it need not contain such an allegation nor is such proof required at trial for a con-

viction. The government has thus created a species of strict criminal liability; wrongdoing need not be proved. The government's position is that the *mere request* for funds addressed to one whom the public employee *might* potentially affect, is extortion under the Hobbs Act. The viciousness of this position is that the government is empowered thereby to bring prosecutions which are *ex post facto*. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964).

2. (b) Answer to the Government's argument that its theory of the case "does not threaten public officials engaged in legitimate fund raising" (P. 7- of Brief).

The government argues that the within indictment alleges a culpable mental state of mind because it charges petitioner with "knowingly and wilfully" obtaining money from Cosulich under color of official right. The government has improperly equated the elements of "knowingly" and "wilfully" with that of "corrupt use of office". "Knowingly" and wilfully" relate to the question of whether petitioner's acts were inadvertent or not, not whether petitioner acted with a corrupt heart and a guilty mind.

When Congressman Hobbs, the sponsor of the Act, was asked during Congressional debate on the bill, whether the word "wrongful" applied to the section of the Act in question, the Congressman answered emphastically, *"Yes; it qualifies the whole section"* (emphasis added; 91 *Cong. Rec.* 11908).

While the phrase "under color of official right" had an historically recognized and acceptable meaning at common law, the common law crime of extortion has no application to the case at bar. Common law extortion under

the color of official right involved the wrongful taking of a *fee* under color (appearance) of an official right to do so. The circuit courts (3rd Cir. in *United States* v. *Kenny*, 462 F.2d 1205 (1972); the 7th Cir. in *United States* v. *Staszcuk*, 502 F.2d 875; the 4th Cir. in *United States* v. *Price*, 507 F.2d 1349; the 1st Cir. in *United States* v. *Hathaway*, No. 75-1352, decided March 24th, 1976, and the 2nd Cir. in the case at bar), have distorted out of all recognition the common law crime of extortion, and have created a new species of criminality, never recognized at common law, never envisioned by the Congress, and never sanctioned by this Court.* As Justice Brandeis cautioned in his notable dissent in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding".

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* In *United States* v. *Green*, 350 U.S. 415 the Court was sufficiently concerned with whether the Hobbs Act envisioned a benefit to a third party, rather than directly to the extortioner, to grant review. But *Green* necessarily involved the "force, violence, of fear" aspect of the Hobbs Act—*not* the "under color of official right" aspect. Manifestly the decision could not have applied to the "color of official right" aspect since, at common law, extortion under the color of official right involved an unlawful *fee* under the pretense of office and by its very nature precluded payments to a third party who did not assume the color of the office. Thus *Green*, cited by the government (p. 6, n. 3), is not dispositive of the issue. However, the government's argument raises an additional important question warranting a grant of certiorari, to wit:

> Will a third party payment sustain an extortion "under color of official right?"

That question was *not* decided in this Court's decision in *Green*.

3. Answering the Government's argument that the challenge to the constitutionality of the statute should not be determined in advance of trial (P. 8 of Brief).

Under the Court of Appeals decision the petitioner is convictable without the government having to prove any culpable act on the part of the defendant. Petitioner's demurrer is a concession that even thought the facts in the indictment might be true, it does not allege a culpable act without which there cannot be a violation of the Hobbs Act.

It is alleged that petitioner solicited funds. Petitioner finds no need to dispute this. It is alleged that Cosulich made a contribution. Petitioner finds no need to dispute that. It is alleged that petitioner had a position of power. Petitioner finds no need to dispute that. It is alleged that a contribution by check was made payable to the political party of which petitioner was a member. Petitioner finds no need to dispute that. It is alleged that Cosulich believed that he could be affcted by a misuse of power on the part of petitioner. Petitioner finds no need to dispute that.

It is *not* alleged that petitioner committed an act which would have given rise to a reasonable belief that his power was to be used to enforce a contribution. *This* is the allegation that petitioner wishes to dispute. As the circuit court's decision now stands, he will never get that opportunity and the only real triable issue in the case has been sedulously omitted from the indictment, thus making the trial a hollow formality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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